STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EJ01MB-62472
REFERRAL AGENCY NO. 17E-2011-00474

John Heintz, Complainant, v. Malachy Mechanical, Respondent.	Administrative Action **FINDING OF PROBABLE CAUSE**

On September 7, 2011, John Heintz (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that his former employer, Malachy Mechanical (Respondent), discriminated against him in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and constructively discharged him when it denied his request for a reasonable accommodation. On October 4, 2011, the verified complaint was served on Respondent along with a request for documents and information (D&I).

There is no record of Respondent ever filing an answer to the verified complaint as required by N.J.A.C. 13:4-3.1. Rather than initiate a default proceeding pursuant to N.J.A.C. 13:4-5.1, DCR investigated the allegations.[1] Based on the investigation and governing legal standards, the Director now finds as follows.

Complainant is a Bayonne resident who began working for Respondent as a warehouse person on February 26, 2007. He alleged that he was subsequently promoted to warehouse and parts manager. Respondent, which is located at 586 Avenue A, Bayonne, installs,

[1] On August 10, 2012, having not received a response to the D&I, DCR served Respondent with a *subpoena ad testificandum*. When Respondent did not comply, DCR served a second subpoena on June 19, 2013. On July 10, 2013, Respondent's counsel appeared at DCR with Richard Farrell, Sr., Jane Farrell, and what was purported to be Complainant's personnel file, job description, and the company's personnel policy manual.

maintains, and repairs commercial cooking and cooling equipment in the New York and northern New Jersey area. The company's owner, Richard Farrell, Sr., told DCR that the company has approximately fifteen employees.

On or about January 19, 2011, Complainant gave Respondent a letter from his medical doctor describing a certain medical condition and recommending that he not be made to work more than forty hours a week. On or about March 29, 2011, Complainant submitted a second note from his medical doctor again recommending that he not be made to work more than forty hours a week. The second note added a driving restriction, stating, "It is also recommended that he drives locally in Bayonne and Jersey City" due to his condition. Complainant told DCR that his supervisor, Richard Farrell, Jr. (the owner's son), granted those accommodations, and that he was able to perform the essential functions of his position with those accommodations in place. Respondent submitted no evidence or information to refute any of those assertions.

Complainant told DCR that Farrell, Sr., and Farrell, Jr., frequently argued, and that Farrell, Jr., would resign at times but then return to work. He said that in June 2011, Farrell, Sr., fired Farrell, Jr., and replaced him with Brian Lauridsen. Complainant alleged that when he told Farrell, Sr., of his on-going accommodation arrangement, the owner laughed and "said he didn't want to hear it and he wasn't adhering to it." Complainant alleged that the owner changed his schedule to 7 a.m. to 5:30 p.m., made him "assist other techs on jobs" outside of Bayonne and Jersey City "between seven and ten times from June through August 2011," and that as a result, his symptoms worsened and his health deteriorated.

Complainant alleged that he was constructively discharged on August 29, 2011, because of Respondent's "failure to engage in the interactive process or offer him a reasonable accommodation."

During the July 10, 2013, interview, Jane Farrell told DCR that her son was back at work as the operations manager and running the day-to-day business. Farrell, Sr., told DCR that his son took over operations thirteen months earlier, i.e., June 2011. Farrell, Sr., described

Complainant as an hourly worker, who worked from 8 a.m. to 4:30 p.m. and never required overtime. Farrell, Sr., rejected the assertion that Respondent ever denied Complainant's accommodation request. To the contrary, the owner stated that they accommodated Complainant by allowing him to begin work later ("around 10") and leave early when he did not feel well. Farrell, Sr., said that Complainant was not required to drive anywhere off site.

Complainant subsequently clarified that he was not required to drive, but was asked to accompany technicians on trips beyond Bayonne and Jersey City.

On October 4, 2013, Complainant produced an undated letter from Farrell, Jr., addressed to "To Whom It May Concern," which stated in pertinent part:

> . . . I am writing to support John Heintz's unemployment case . . . In the four years John was with Malachy under my management, he was fine employee and was an asset to our company. . . John was diagnosed with COPD and vestibular disorder earlier this year. By doctor's orders, he was only to work a 40 hour week. Under my management, I adhered to those orders. When I was fired, Brian Lauridsen took over my position and put John back to 50 plus hours a week. Brian and the owner did not feel there was anything wrong with John and laughed at the diagnosis. Should you need to speak to me, please feel free to call me.

The DCR investigator left phone messages for Farrell, Jr., which were not returned, and Respondent's counsel has resisted DCR's requests to make Farrell, Jr., available for an interview.

At the conclusion of an investigation, DCR is required to determine whether "probable cause" exists to credit a complainant's allegation of discrimination. N.J.A.C. 13:4-10.2. Probable cause for purposes of this analysis means a "reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby the DCR makes a preliminary determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799.

a. Disability Discrimination

Although the LAD does not specifically address reasonable accommodations, the regulations promulgated to implement the LAD require an employer to "make a reasonable accommodation to the limitations of an employee . . . with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business." N.J.A.C. 13:13-2.5(b); Potente v. County of Hudson, 187 N.J. 103, 110 (2006). Liability may ensue where an employer fails to engage in the interactive process when a reasonable accommodation would otherwise have been possible. Tynan v. Vicinage 13 of the Superior Court, 351 N.J. Super. 385, 400 (App. Div. 2002). To show that an employer failed to participate in the interactive process, a plaintiff must demonstrate that (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. Id. at 400-01.

Because Respondent failed to answer the verified complaint, the Director is forced to draw some conclusions regarding Respondent's legal position based on the documents it produced and the statements its witnesses gave at the July 10, 2013, interview.

In so doing, the Director notes that Respondent has not challenged Complainant's allegation that he has a disability. Nor has Respondent challenged Complainant's assertion that he requested an accommodation. Nor has Respondent challenged Complainant's assertion that was able to perform the essential functions of his position with those accommodations in place. Nor has Respondent challenged the reasonableness of those accommodations. Nor has Respondent challenged the principle that it has a legal obligation to engage in an interactive process when it receives accommodation requests. Instead, Respondent's position appears to boil down to this: It fulfilled its legal obligations by allowing Complainant to come to work late and leave early, and he never had to drive anywhere.

However, the letter from Farrell, Jr., appears to corroborate Complainant's chief allegations. Farrell, Jr. said that Complainant was a "fine employee" and that Respondent's owner "did not feel there was anything wrong with [Complainant] and laughed at the diagnosis" and returned him to a fifty hour work week. Conspicuously absent from Complainant's personnel file were the two notes provided by Complainant's medical doctor or any mention whatsoever of his accommodation requests. Such absence further bolsters Complainant's allegation that Respondent did not treat his requests seriously; that there was no interactive process and that Respondent simply rejected his requests out of hand in June 2011. Complainant's personnel records did not indicate his scheduled hours or make any mention of travel assignments.

In a recent letter, Respondent's counsel argued that the instant matter should be dismissed because the statute of limitations had passed. He wrote:

> Statute of Limitations Has Expired. In order to save a lot of time, effort, and unnecessary interference in the workplace, Mr. Heintz voluntarily left employment in August 2011; over two years have passed. Claims under the NJLAD are subject to a (2) two-year statute of limitations. Montells v. Haynes, 133 N.J. 282, 627 A.2d 654, 655 (N.J. 1993) . . .

That argument is not persuasive. The two-year statute of limitations referenced in Montells applies to civil actions filed in Superior Court. This is an administrative proceeding and has a different statute of limitations. See generally N.J.A.C. 13:4-2.5. Complainant filed his verified complaint on September 7, 2011, based on conduct that allegedly occurred in June and August of the same year. It was served on Respondent on October 4, 2011. Thus, the complaint was filed within the applicable 180-day statute of limitations.

In sum, based on Respondent's statements at the July 10, 2013, interviews, there is no dispute that Respondent knew about the Complainant's disability; that Complainant requested accommodations for his disability; and that Complainant could have been reasonably accommodated. Based on the letter from Farrell, Jr., it appears that Respondent did not make a good faith effort to assist the Complainant in continuing his accommodations, but simply

rejected same without any good faith interactive process. Such conduct violates the LAD. Tynan, supra, 351 N.J. Super. 385.

b. Constructive Discharge

To prevail on a claim of constructive discharge, a plaintiff must show that the "employer knowingly permits conditions of employment so intolerable that a reasonable person subjected to them would resign." Jones v. Aluminum Shapes, Inc., 339 N.J. Super. 412 (App. Div. 2001) (noting "the phrase 'intolerable conditions' conveys a sense of outrageous, coercive and unconscionable requirements"). A constructive discharge claim requires a showing of conduct that is more egregious than the "severe and pervasive" harassment required for a hostile work environment claim. Shepherd v. Hunterdon Devel. Ctr., 174 N.J. 1, 28 (2002).

Here, Complainant initially alleged that he felt compelled to resign because of Respondent's "failure to engage in the interactive process or offer him a reasonable accommodation." However, when a DCR investigator asked him during a subsequent interview why he considered the work environment to be intolerable, Complainant replied:

> He had me doing things that I should not have to do like walking his dog, and shoveling snow. He made me pick up his dry cleaning. I was a parts manager and warehouse manager. That was not my job and I should not be forced to do that.

Farrell, Sr., described Complainant's assigned duties as receiving deliveries, unpacking and assigning part numbers to deliveries, placing them in the stock room, starting the trucks once a week, and taking out the garbage. Farrell, Sr. said that Complainant was a "general helper guy." He denied ever making him shovel snow.

But even assuming that the owner asked the Complainant to perform those tasks, there was no allegation or evidence that those requests were motivated by some sort of discriminatory or retaliatory animus or had any adverse affect him due to his disability. In the absence of any causal link between his protected class and the alleged conduct, the Director finds that Complainant's indignation of being asked to perform tasks that he deemed beneath

him, without more, is insufficient to trigger a constructive discharge in the context of an employment discrimination claim.

Based on the investigation, the Director is satisfied that there is sufficient evidence to support a reasonable suspicion of disability discrimination but insufficient evidence to support a reasonable suspicion of constructive discharge.

WHEREFORE, it is hereby determined and found that Probable Cause exists to partially credit the allegations contained in the verified complaint.

10-28-13
Date

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS